

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

DAVID LEE SIEWERT,

Petitioner,

vs.

DIRECTOR OF CORRECTIONS, *et al.*,

Respondents.

3:07-cv-00020-LRH-VPC

ORDER

This action is a *pro se* petition for a writ of habeas corpus filed pursuant to 28 U.S.C. § 2254, by David Lee Siewert, a Nevada state prisoner. This action comes before the Court with respect to the merits of the amended petition.

I. Procedural History

On October 9, 2001, an information was filed in the Fifth Judicial District Court of Nevada, charging petitioner with one count of sexual assault against a child under the age of fourteen. (Exhibit 6).¹ A jury trial was held from February 4, 2002, through February 6, 2002. (Exhibits 13-15). Petitioner was found guilty of the charge. (Exhibit 17). Petitioner's sentencing hearing was conducted on May 22, 2002, at which time he was sentenced to life with the possibility of parole after 10 years. (Exhibit 20).

¹ The exhibits referenced in this order were provided by respondents in support of their motion to dismiss and are found in the Court's record at Docket #18 and #19.

1 Petitioner filed a timely notice of appeal. (Exhibit 21). Petitioner filed a motion for a new
2 trial on the same date, June 27, 2002. (Exhibit 22). On February 18, 2004, the Nevada Supreme
3 Court issued its order of affirmance. (Exhibit 29).

4 Petitioner filed a state post-conviction habeas petition on January 11, 2005. (Exhibit 33).
5 The state district court dismissed the habeas petition on December 8, 2005. (Exhibit 39). On
6 November 29, 2006, the Nevada Supreme Court issued its order of affirmance of the state district
7 court's denial of petitioner's state habeas petition. (Exhibit 44). Remittitur issued on December 26,
8 2006. (Exhibit 46).

9 This Court received petitioner's federal habeas petition on January 10, 2007. (Docket #1,
10 #4). Respondents filed a motion for more definite statement. (Docket #8). The Court granted
11 respondents' motion by order filed January 17, 2008. (Docket #11).

12 Petitioner filed an amended petition on February 15, 2008. (Docket #12). Petitioner raises
13 the following grounds in his amended petition:

14 Ground 1(a): "Violation of *Petrocelli* hearing."

15 Ground 1(b): "Violation of 72-hour arraignment."

16 Ground 1(c): "Violation of preliminary [hearing] law."

17 Ground 2: Petitioner alleges that his right to a fair trial was violated
18 because "false testimony was uttered by [a] key witness."

19 Ground 3: Petitioner claims that his right to a fair trial was violated
20 because he should have been given a psycho-sexual evaluation prior to
his trial rather than before his sentencing.

21 (Am. Petition, at Docket #12).

22 Respondents moved to dismiss Grounds 1(a), (b), and (c). (Docket #17). By order filed
23 December 10, 2008, this Court determined that Ground 1(a) was not cognizable as a federal habeas
24 claim. (Docket #24). The Court further found that Grounds 1(b) and 1(c) were procedurally
25 defaulted. (*Id.*). The Court dismissed Grounds 1(a), (b), and (c), and directed respondents to file an
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1 answer addressing Grounds 2 and 3 of the amended petition. (*Id.*). On May 14, 2009, respondents
2 filed their answer. (Docket #34). Petitioner has not filed a reply to the answer.

3 **II. Federal Habeas Corpus Standards**

4 The Antiterrorism and Effective Death Penalty Act (“AEDPA”), at 28 U.S.C. § 2254(d),
5 provides the legal standard for the Court’s consideration of this habeas petition:

6 An application for a writ of habeas corpus on behalf of a person
7 in custody pursuant to the judgment of a State court shall not be
8 granted with respect to any claim that was adjudicated on the merits in
9 State court proceedings unless the adjudication of the claim –

10 (1) resulted in a decision that was contrary to, or involved an
11 unreasonable application of, clearly established Federal law, as
12 determined by the Supreme Court of the United States; or

13 (2) resulted in a decision that was based on an unreasonable
14 determination of the facts in light of the evidence presented in the State
15 court proceeding.

16 The AEDPA “modified a federal habeas court’s role in reviewing state prisoner applications
17 in order to prevent federal habeas ‘retrials’ and to ensure that state-court convictions are given effect
18 to the extent possible under law.” *Bell v. Cone*, 535 U.S. 685, 693-694 (2002). A state court
19 decision is contrary to clearly established Supreme Court precedent, within the meaning of 28 U.S.C.
20 § 2254, “if the state court applies a rule that contradicts the governing law set forth in [the Supreme
21 Court’s] cases” or “if the state court confronts a set of facts that are materially indistinguishable from
22 a decision of [the Supreme Court] and nevertheless arrives at a result different from [the Supreme
23 Court’s] precedent.” *Lockyer v. Andrade*, 538 U.S. 63, 73 (2003) (quoting *Williams v. Taylor*, 529
24 U.S. 362, 405-406 (2000) and citing *Bell v. Cone*, 535 U.S. 685, 694 (2002)).

25 A state court decision is an unreasonable application of clearly established Supreme Court
26 precedent, within the meaning of 28 U.S.C. § 2254(d), “if the state court identifies the correct
27 governing legal principle from [the Supreme Court’s] decisions but unreasonably applies that
28 principle to the facts of the prisoner’s case.” *Lockyer v. Andrade*, 538 U.S. at 75 (quoting *Williams*,
29 529 U.S. at 413). The “unreasonable application” clause requires the state court decision to be more

1 than merely incorrect or erroneous; the state court's application of clearly established federal law
2 must be objectively unreasonable. *Id.* (quoting *Williams*, 529 U.S. at 409).

3 In determining whether a state court decision is contrary to, or an unreasonable application of
4 federal law, this Court looks to the state courts' last reasoned decision. *See Ylst v.*
5 *Nunnemaker*, 501 U.S. 797, 803-04 (1991); *Shackleford v. Hubbard*, 234 F.3d 1072, 1079 n.2 (9th
6 Cir. 2000), *cert. denied*, 534 U.S. 944 (2001).

7 Moreover, "a determination of a factual issue made by a State court shall be presumed to be
8 correct," and the petitioner "shall have the burden of rebutting the presumption of correctness by
9 clear and convincing evidence." 28 U.S.C. § 2254(e)(1).

10 **III. Discussion**

11 **A. Ineffective Assistance of Counsel Standard**

12 The amended petition raises alleged instances of ineffective assistance of counsel.
13 Ineffective assistance of counsel claims are governed by the two-part test announced in *Strickland v.*
14 *Washington*, 466 U.S. 668 (1984). In *Strickland*, the Supreme Court held that a petitioner claiming
15 ineffective assistance of counsel has the burden of demonstrating that (1) the attorney made errors so
16 serious that he or she was not functioning as the "counsel" guaranteed by the Sixth Amendment, and
17 (2) that the deficient performance prejudiced the defense. *Williams v. Taylor*, 529 U.S. 362, 390-391
18 (2000) (citing *Strickland*, 466 U.S. at 687). To establish ineffectiveness, the defendant must show
19 that counsel's representation fell below an objective standard of reasonableness. *Id.* To establish
20 prejudice, the defendant must show that there is a reasonable probability that, but for counsel's
21 unprofessional errors, the result of the proceeding would have been different. *Id.* A reasonable
22 probability is "probability sufficient to undermine confidence in the outcome." *Id.* Additionally, any
23 review of the attorney's performance must be "highly deferential" and must adopt counsel's
24 perspective at the time of the challenged conduct, in order to avoid the distorting effects of hindsight.
25 *Strickland*, 466 U.S. at 689. It is the petitioner's burden to overcome the presumption that counsel's
26 actions might be considered sound trial strategy. *Id.*

1 Ineffective assistance of counsel under *Strickland* requires a showing of deficient
2 performance of counsel resulting in prejudice, “with performance being measured against an
3 ‘objective standard of reasonableness,’ . . . ‘under prevailing professional norms.’” *Rompilla v.*
4 *Beard*, 545 U.S. 374, 380 (2005) (quotations omitted). If the state court has already rejected an
5 ineffective assistance claim, a federal habeas court may only grant relief if that decision was contrary
6 to, or an unreasonable application of the *Strickland* standard. See *Yarborough v. Gentry*, 540 U.S. 1,
7 5 (2003). There is a strong presumption that counsel’s conduct falls within the wide range of
8 reasonable professional assistance. *Id.*

9 **B. Ground 2**

10 Petitioner claims that his right to a fair trial under the Fifth, Sixth, and Fourteenth
11 Amendments were violated when the state district court did not allow him to present an oral motion
12 for a new trial based on newly-discovered evidence at his sentencing hearing. (Docket #12, at p. 6).
13 Petitioner alleges that his counsel and the court were negligent for not allowing the evidence to be
14 examined. (*Id.*). Petitioner further alleges that trial counsel was ineffective for failing to take the
15 deposition of Ione Clontz, who provided a letter that was the basis for petitioner’s motion for a new
16 trial. (*Id.*).

17 At petitioner’s May 22, 2002 sentencing hearing, before the court pronounced the sentence,
18 petitioner’s counsel moved for a new trial based on newly-discovered evidence. (Exhibit 19, at p. 3).
19 The court ordered sentencing to proceed that day and ordered petitioner’s counsel to file a motion for
20 new trial, rather than bring an oral motion. (*Id.*, at p. 5). The court also accepted the letter allegedly
21 written by Ione Clontz as part of petitioner’s presentence investigation report. (*Id.*, at p. 6). The
22 court then sentenced petitioner. (*Id.*).

23 On June 27, 2002, petitioner filed a motion for a new trial. (Exhibit 22). Petitioner relied on
24 newly-discovered evidence, namely, a letter dated May 18, 2002, from a defense trial witness, Ione
25 Clontz, which was sent to defense counsel. (*Id.*, at p. 2). Petitioner asserted that the letter “suggests
26 that the ‘complaining witness’ may not have been truthful in her testimony at trial [sic].” (*Id.*).
27 Petitioner argued that he was convicted based on the testimony of the victim, his daughter, Roxanne.

1 (*Id.*, at p. 4). Petitioner asserted that Clontz indicated in her letter that after trial she questioned
2 Roxanne and she believed that Roxanne was not truthful in her trial testimony. (*Id.*).

3 On March 19, 2003, the state district court held a hearing on petitioner's motion for a new
4 trial. (Exhibit 27). The court recounted the content of the letter that Ione Clontz sent to petitioner's
5 counsel, which was the basis for petitioner's motion for a new trial: In the letter, Clontz wrote that
6 she had stated to Roxanne at some point after trial, "You know very well that your father never
7 touched you in any way or harmed you at all, did he?" (*Id.*, at p. 4). The letter stated that, in
8 response to Clontz's question, Roxanne nodded her head, dropped her eyes and said "I know." (*Id.*).
9 The court noted that Ione Clontz had died sometime after she wrote the letter to petitioner's counsel
10 and that she would not be present as a witness. (*Id.*, at p. 4). The court allowed the Clontz letter to
11 be admitted into evidence at the hearing. (*Id.*). The court then heard the testimony of the victim,
12 Roxanne and her brother, Nicholas. (*Id.*). Both Roxanne and Nicholas' testimony contradicted
13 Clontz's letter. (*Id.*, at pp. 7-10, 12). Petitioner's counsel called no other witnesses and argued that
14 there was sufficient newly discovered evidence to warrant a new trial. (*Id.*, at 16). The court denied
15 the motion for a new trial, as the court believed "that the children are telling the truth about what
16 occurred back then." (*Id.*, at pp. 18-19). The court further found that the children were not coached
17 or led in their testimony at the hearing. (*Id.*, at pp. 19-20).

18 Petitioner's claim in Ground 2 that the court and trial counsel were negligent for not allowing
19 evidence in support of petitioner's motion for a new trial at sentencing is belied by the record. While
20 petitioner was not allowed to present his motion orally at sentencing, the trial court later held a full
21 hearing on the motion for a new trial, after briefing by the parties. (Exhibit 27). Petitioner has not
22 shown ineffective assistance of counsel or error by the trial court.

23 Petitioner also claims in Ground 2 that his counsel was ineffective for failing to take the
24 deposition of Ione Clontz due to her age. Petitioner alleges that Clontz's age at the time was 83.
25 However, petitioner fails to explain how his counsel should have predicted that Clontz would die or
26 otherwise be unavailable to testify at the hearing on the motion for a new trial. Petitioner has not
27 shown that his counsel's representation fell below an objective standard of reasonableness.

1 Additionally, petitioner has not shown that he was prejudiced by his counsel's failure to take a
2 deposition of Clontz. The court admitted Clontz's letter without objection from either party.
3 (Exhibit 27, at p. 4). Petitioner fails to allege what further information Clontz could have provided,
4 had she testified at a deposition. Moreover, petitioner fails to allege that, even if counsel had taken a
5 deposition, that the state court would have admitted the deposition into evidence. Petitioner's
6 counsel was not ineffective for failing to take the deposition of Ione Clontz and petitioner was not
7 prejudiced by the lack of a deposition. Petitioner is not entitled to relief on his allegation of
8 ineffective assistance of counsel.

9 Regarding the state court's findings and ruling on the motion for new trial, the factual
10 findings of the state court are presumed correct. 28 U.S.C. § 2254(e)(1). Petitioner has failed to
11 meet his burden of proving that the state court's ruling was contrary to, or involved an unreasonable
12 application of, clearly established federal law, as determined by the United States Supreme Court, or
13 that the ruling was based on an unreasonable determination of the facts in light of the evidence
14 presented in the state court proceeding. This Court will deny habeas relief as to Ground 2.

15 **C. Ground 3**

16 Petitioner claims that his trial counsel was ineffective for failing to "obtain and present
17 psychological testimony relative to [petitioner's] mental status prior to [his] trial." (Docket #12, at p.
18 9). Petitioner alleges that because of "the mere fact of prior mental health problems" a psychosexual
19 evaluation should have occurred before trial. (*Id.*). Petitioner further alleges that his counsel, the
20 prosecutor, and the judge were negligent for failing to request a psychological evaluation before trial
21 began. (*Id.*). Petitioner claims that his counsel was ineffective for failing to conduct an investigation
22 into Siewert's wife. (*Id.*, at p. 10). Petitioner does not allege why counsel should have further
23 investigated petitioner's wife. (*Id.*).

24 Citing the appropriate standard under *Strickland v. Washington*, the Nevada Supreme Court
25 addressed petitioner's claim that his counsel was ineffective for failing to obtain and present
26 psychological testimony regarding his mental status prior to or at trial:

1 Fourth, appellant claimed that his trial counsel was ineffective for
2 failing to obtain psychological testimony relative to his mental status
3 prior to trial and present such information to the jury. Specifically,
4 appellant claimed that the doctor who conducted a psychosexual
5 examination on him prior to sentencing concluded that appellant was
6 not a pedophile. Appellant argued that his counsel should have had the
7 psychosexual examination prior to trial and had the findings presented
8 to the jury.

9 Appellant failed to demonstrate that his counsel was deficient. A
10 psychosexual examination is not conducted until after a defendant has
11 been convicted of a sexual offense, and must be made before the
12 imposition of sentence. [Footnote 5: See 1999 Nev. Stat., ch. 310, § 3,
13 at 1285-86 (NRS 176.135)]. Further, appellant failed to demonstrate
14 that presentation of the psychosexual examination findings would have
15 resulted in a different outcome at trial. Although the psychosexual
16 examination report stated the evaluator's opinion that appellant was
17 not a pedophile, the report also stated the evaluator's opinion that
18 appellant was a threat to the health, safety and morals of the
19 community. Accordingly, we conclude that the district court did not
20 err in denying this claim.

21 (Exhibit 44, at pp. 3-4). Petitioner has failed to meet his burden of proving that the Nevada Supreme
22 Court's ruling was contrary to, or involved an unreasonable application of, clearly established federal
23 law, as determined by the United States Supreme Court, or that the ruling was based on an
24 unreasonable determination of the facts in light of the evidence presented in the state court
25 proceeding.

26 The Nevada Supreme Court also addressed petitioner's claim that his counsel was
27 ineffective for failing to conduct an investigation into petitioner's wife and to properly cross-
examine his wife:

28 Sixth, appellant claimed that his trial counsel was ineffective for
29 failing to investigate or properly cross-examine appellant's wife.
30 Specifically, appellant claimed that his counsel should have obtained
31 copies of his wife's daily journal. Appellant further claimed that his
32 counsel should have cross-examined his wife about journal entries
33 indicating that she wanted to get rid of appellant, and about his wife's
34 treatment for bi-polar disorder, her use of psychotropic medications,
35 and her being delusional and suicidal. Appellant asserted that such
36 investigation and cross-examination would have undermined the
37 credibility of his wife's testimony.

38 Appellant failed to demonstrate that his counsel was deficient. The
39 record indicates that appellant's counsel rigorously cross-examined
40 appellant's wife. Further, appellant failed to demonstrate that
41 additional investigation or cross-examination of appellant's wife

1 would have altered the outcome of the trial. It was appellant's
2 daughter, not his wife, who was the victim and accused appellant.
3 Appellant's daughter testified at trial as to the sexual acts and touching
4 her father engaged in with her. Appellant failed to demonstrate that
5 additional investigation or cross-examination of appellant's wife
would have diminished the credibility of the victim's testimony.
Accordingly, we conclude the district court did not err in denying this
claim.

6 (Exhibit 44, at pp. 5-6). The factual findings of the state court are presumed correct. 28 U.S.C. §
7 2254(e)(1). Petitioner has failed to meet his burden of proving that the Nevada Supreme Court's
8 ruling was contrary to, or involved an unreasonable application of, clearly established federal law, as
9 determined by the United States Supreme Court, or that the ruling was based on an unreasonable
10 determination of the facts in light of the evidence presented in the state court proceeding. This Court
11 denies habeas relief as to Ground 3.

12 **IV. Certificate of Appealability**

13 In order to proceed with his appeal, petitioner must receive a certificate of appealability. 28
14 U.S.C. § 2253(c)(1); Fed. R. App. P. 22; 9th Cir. R. 22-1; *Allen v. Ornoski*, 435 F.3d 946, 950-951
15 (9th Cir. 2006); *see also United States v. Mikels*, 236 F.3d 550, 551-52 (9th Cir. 2001). Generally, a
16 petitioner must make "a substantial showing of the denial of a constitutional right" to warrant a
17 certificate of appealability. *Id.*; 28 U.S.C. § 2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 483-84
18 (2000). "The petitioner must demonstrate that reasonable jurists would find the district court's
19 assessment of the constitutional claims debatable or wrong." *Id.* (*quoting Slack*, 529 U.S. at 484). In
20 order to meet this threshold inquiry, the petitioner has the burden of demonstrating that the issues are
21 debatable among jurists of reason; that a court could resolve the issues differently; or that the
22 questions are adequate to deserve encouragement to proceed further. *Id.*

23 This Court has considered the issues raised by petitioner, with respect to whether they satisfy
24 the standard for issuance of a certificate of appealability, and determines that none meet that
25 standard. The Court will therefore deny petitioner a certificate of appealability.

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1 **V. Conclusion**

2 **IT IS THEREFORE ORDERED** that the amended petition for a writ of habeas corpus is
3 **DENIED IN ITS ENTIRETY.**

4 **IT IS FURTHER ORDERED** that the Clerk **SHALL ENTER JUDGMENT**
5 **ACCORDINGLY.**

6 **IT IS FURTHER ORDERED** that petitioner is **DENIED A CERTIFICATE OF**
7 **APPEALABILITY.**

8 DATED this 9th day of December, 2009.



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LARRY R. HICKS
UNITED STATES DISTRICT JUDGE
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